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IN THE

Supreme Court of the United States

October Term, 1995

STATE OF FLORIDA DEPARTMENT OF REVENUE, and CONTINENTAL CASUALTY COMPANY,

Petitioners,

v.

GENERAL DEVELOPMENT CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

The linchpin of Respondent's Brief in Opposition is its argument that the Eleventh Circuit did *not* resort to Florida State law for a definition of the terms "assessed" and "assessable" in the Federal Bankruptcy Code. (Opp. 4).

Respondent is plainly wrong. Even the most cursory reading of that opinion makes it unmistakably clear that the Eleventh Circuit drew its definition of these terms from Florida law: for example, ". . . only one Florida Statute provided a definition of the conditions of assessment." (Pet. A-7; *see also* Pet. A-6, A-9, A-11).

Respondent's Opposition is an extended attempt to confuse the definition of the terms "assessed" and "assessable", as they appear in the Bankruptcy Code, with the findings concerning "applicable" state law necessary to the application of that Federal definition to the tax law of a particular state. The definition of the terms "assessed" and "assessable" is a matter of Federal law. *See King v. Franchise Tax Bd. of California (In re King)*, 961 F.2d 1423 (9th Cir. 1992); *City of New York v. Feiring*, 313 U.S. 283 (1941). In determining whether the state's assertion of its tax in a particular case satisfies the Federal definition of "assessed", the Federal court of course must reference state law. *King*, 961 F.2d at 1426-27; *Feiring*, 313 U.S. at 285. Reference to state law, in applying the Federal definition of "assessment", is in no way inconsistent with the rule that Federal law defines terms in the Federal bankruptcy laws.

In contrast, the Eleventh Circuit erroneously held that Florida State law supplies the definition of "assessment." (Pet. A-6, A-7, A-9, and A-11). Because that holding conflicts with the Court's holding in *Feiring* and the analysis of other Federal courts that have considered the question, it should be reviewed by this Court and reversed. (Pet. 8-11).

I. THE ELEVENTH CIRCUIT REFUSED TO FOLLOW *FEIRING* AND *KING*

A. The Eleventh Circuit Adopted Florida State Law In Defining The Terms "Assessed" And "Assessable" In The Federal Bankruptcy Code.

Despite Respondent's attempts to confuse, it is unmistakably clear that the Eleventh Circuit used Florida law to define the terms "assessed" and "assessable" in the Federal Bankruptcy Code. After describing the facts, the Eleventh Circuit states: "Based on the provision's use of the term 'applicable law,' it is apparent that state law should govern the determination of when a state corporate tax is considered assessed." (Pet. A-6). The court goes on: "Accordingly, we must look to Florida law to determine when GDC's tax liability was considered assessed." (*Id.*). If these references contain any ambiguity as to what the court was doing, it proceeded to say: ". . . only one Florida statute provided a definition of the conditions of assessment." (Pet. A-7).

The Eleventh Circuit then proceeded to reject Petitioner's argument that "the tax is not assessed until the amount is finally liquidated and subject to collection" under Federal law on the grounds that "this is not what the plain meaning of the Florida statutes suggest." (Pet. A-9). In applying the wrong law, the Eleventh Circuit not surprisingly reached the wrong result. The Eleventh Circuit denied priority to the Florida tax claim by finding that Florida's "assessment" occurred some 10 years before the tax became final and collectible. That result imposes a severe disadvantage uniquely applicable to the Florida taxing authority.

Respondent's bold assertion that the concept of assessment has never been defined in terms which made its incidence subsequent to judicial proceedings overlooks the Internal Revenue Code. (Opp. 7-8). Under the Internal Revenue Code,

a Federal creditor is prohibited from making an "assessment" until the decision of the tax court, the circuit court, and this Court all render a final decision. An "assessment" under the Code is a bookkeeping notation made when the Secretary establishes an account against the taxpayer on the tax rolls. *Laing v. United States*, 423 U.S. 161, 170 n.13 (1976). The assessment shall not be made "until the decision of the Tax court *has become final*." 26 U.S.C. § 6213(a) (emphasis added). Finality occurs after review by the circuit court and this Court. *See* 26 U.S.C. §§ 6215, 7483 (notice of appeal), 7485 (stay of assessment).

Furthermore, the concept of finality adopted for the Federal definition of assessment by the Ninth Circuit in *King* entails completion of all proceedings upon which collection of the tax is dependent, whether judicial or administrative in nature. Respondent's argument that an assessment must occur before judicial review is insupportable. To the contrary, the concept of assessment is customarily defined in terms which require the completion of all administrative and judicial proceedings to determine the validity of a tax claim. To Petitioner's knowledge, the only court which has imposed a definition of assessment that occurs prior to the completion of all administrative or judicial proceedings necessary to establish liability is the Eleventh Circuit in this case.

B. The Eleventh Circuit Decision Conflicts With Supreme Court Precedent.

Respondent's attempt to reconcile the Eleventh Circuit's opinion with this Court's opinion in *Feiring* is a transparent extension of its attempt to confuse the question of what law applies to define terms in the Federal bankruptcy laws with the reference to state law entailed in the application of the Federal definition to a state tax in a particular case. In

Feiring, this Court clearly held that terms in the Federal bankruptcy laws are to be determined by Federal law:

> "Whether the present obligation is a 'tax' entitled to priority within the meaning of the [Federal bankruptcy] statute is a federal question. . . . Hence we look to the terms and purposes of the Bankruptcy Act as establishing the criteria upon the basis of which the priority is to be allowed." *Feiring*, 313 U.S. at 285.

The *Feiring* Court was equally clear in holding that reference is made to state law only to determine whether the facts of the particular case satisfy the Federal definition in application of the bankruptcy laws:

> "The particular demand for which the City now claims priority of payment as a tax is created and defined by state enactment. We turn to its provisions and the decisions of the state courts in interpreting them, *not to learn whether they have denominated the obligation a 'tax' but to ascertain whether its incidents are such as to constitute a tax within the meaning of* [the Federal Bankruptcy Act]." *Id.* (emphasis supplied).

The Eleventh Circuit refused to follow *Feiring* by adopting a state-law definition of "assessment." Respondent attempts to shield the Eleventh Circuit's decision from review by confusing the definition of a statutory term with its application. Petitioners respectfully submit that Respondent's Opposition provides no legitimate basis for denying certiorari and that certiorari should be granted to correct the Eleventh Circuit's erroneous refusal to apply Federal law.

C. The Eleventh Circuit Decision Creates Inter-Circuit Conflict.

Respondent further argues that the decision below creates no conflict with the Ninth Circuit case of *King v. Franchise Tax Bd. of California (In re King)*, 961 F.2d 1423 (9th Cir. 1992), relying on its arguments that the Eleventh Circuit

"differentiated the procedural posture of the two cases" and "distinguished the statutory delineation of the moment of assessment in California from that in Florida." (Opp. 13).

Neither of these arguments address the conflict between the Ninth and Eleventh Circuits. That conflict arises from the fact that the Ninth Circuit relied on Federal law in adopting a definition of assessment generally applicable under the Federal Bankruptcy Code defined in terms of finality, whereas the Eleventh Circuit adopted the Florida state definition, irrespective of finality. *Compare King*, 961 F.2d at 1427 *with* Pet. A-7, A-9.

As for Respondent's distinctions, the procedural posture of *King* was irrelevant to the Ninth Circuit's definition of an assessment as "a formal act with significant consequences" that "cannot occur before it is final." *King*, 961 F.2d at 1427. The procedural posture was relevant only in determining whether the tax, according to the applicable law, met that definition. Applying the court's general definition, the assessment in *King* was "final" as of the date the ability of the taxpayer to appeal lapsed. *Id.* Contrary to Respondent's argument, the question of what law should be applied to define the term "assessed" in the Federal Bankruptcy Code cannot logically depend upon the taxpayer's conduct in a particular case.

Similarly, a state's "delineation" of the "moment of assessment" is precisely what the *King* court concluded was *not* controlling in determining whether an act of assessment has occurred. The Court clearly stated: "California's failure to label a certain event as the act of assessment does not, however, control the disposition of our inquiry. We examine state-created rights so that they can be translated into the bankruptcy process." *Id.* at 1426. The fact that California failed to delineate the moment of "assessment" and Florida, according to the Eleventh Circuit, has done so, is irrelevant. The point is that neither California nor Florida law can define

an act as one of "assessment" under the Federal Bankruptcy Code, but can only set forth tax collection procedures that a Federal court must examine to determine whether the tax meets or fails to meet a uniform Federal definition.

Equally unavailing is Respondent's reliance on the decisions in *Franchise Tax Bd. v. Bracey (In re Bracey)*, 77 F.3d 294 (9th Cir. 1996) and *Wernimont v. Iowa Dep't of Rev. (In re Wernimont)*, 183 B.R. 181 (Bankr. N.D. Iowa 1994). (Opp. 13-14). Both cases support the Petitioners.

Bracey reaffirmed the Ninth Circuit's decision in *King* which defined the term "assessed" *not* by looking to state law, but by applying a uniform Federal definition of that term. *Id.* at 295.[1] The Ninth Circuit looked to state law in *Bracey* only to determine whether a tax protest had been timely "filed" because such an appeal would prevent the tax from being final—i.e. "assessed." *Id.* at 295-96.

Respondent's reliance on *Wernimont* is also misplaced. *Wernimont* recognized the definition of "assessment" employed in *King*—and did *not* derive its definition of "assessment" from Iowa law. *Id.* at 184. Only after the correct Federal definition of "assessed" was set forth did the court "[a]pply[] these definitions to Iowa law" to determine whether an "act of assessment" occurred. *Id.*

Nothing in either *Bracey* or *Wernimont* lends support to the Eleventh Circuit's practice of borrowing definitions of assessment from the laws of the various states to define the

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[1] *Bracey* also demonstrates that the procedural posture of the case has nothing to do with the meaning given by the Ninth Circuit to the term "assessed." (Opp. 13 n.2). In *Bracey*, the taxpayer *did* appeal the assessment by filing a formal protest. The *King* rule and Federal law apply whether the taxpayer appeals or not. The taxpayer's timely protest in *Bracey* meant that the "assessment" by the State of California was not yet "final" under the *King* criteria. *Bracey*, 77 F.3d at 296. This is precisely the situation here.

term "assessment" as it appears in the Federal Bankruptcy Code. To the contrary, both cases rely on *King* and adopt a uniform Federal definition of "assessment," making it clear that *King*, *Bracey* and *Wernimont* all follow Federal law.

II. THE DECISION BELOW IS IMPORTANT TO STATE TAXING AUTHORITIES BECAUSE IT DISRUPTS THE UNIFORM TREATMENT OF STATE TAXES IN BANKRUPTCY

Respondent suggests that because "a taxpayer had the obligation either to pay in full the amount of tax in dispute or to post a bond that guarantees payment", Florida has little interest in the outcome of this dispute.[2] (Opp. 15). The argument misses the point. At issue here is whether the Federal Bankruptcy Code should discriminate between identical claims arising under the laws of different states based on the way in which each state defines the term "assessed." The Eleventh Circuit's decision disrupts the uniform application of the Federal Bankruptcy Code by rejecting the necessity of a uniform Federal definition of the term "assessed". The Eleventh Circuit's decision also frustrates the intent of the Bankruptcy Code by denying priority to DOR's claim even though the DOR was unable to collect from GDC prior to GDC's bankruptcy because its claim had not been finalized.

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[2] The fact that GDC bonded its liability in this case is immaterial. Unless the Eleventh Circuit's decision is reversed, the Court may rest assured that the Circuit's accelerated definition of assessment will afford taxpayers ample opportunity to delay payment beyond "assessment" without bonding. Bonding is required in the Federal system when a taxpayer appeals a decision from the Tax Court to the Court of Appeals, but assessment does not occur until final disposition of the matter by the circuit court and this Court. *See supra* p.3.

III. THE TAX WAS CLEARLY ASSESSED "BY AGREEMENT" WITHIN THE MEANING OF THE BANKRUPTCY CODE

Respondent claims that the parties' agreement to GDC's liability for tax and the amount of that liability did not constitute an assessment by agreement despite the fact that the parties' agreement rendered the tax claim final because the parties reserved their positions as to the priority in bankruptcy of these tax claims.[3]

If *King* correctly defined the term "assessment" in terms of finality, the parties' agreement to GDC's tax liability would necessarily constitute an assessment by agreement. To permit private parties to defeat characterization of their agreements as "assessments by agreement" by imposing conditions that relate to the priority of a tax claim in bankruptcy would allow parties to define terms under the Federal Bankruptcy laws. The Eleventh Circuit delegated the definition of terms in the Federal Bankruptcy laws to an agreement between the parties. Petitioners urge this Court to grant certiorari to correct this unprecedented deviation from the applicability of Federal law to determine the meaning of a Federal statute.

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[3] Respondent and the Eleventh Circuit also argue that the parties' agreement cannot be an assessment by agreement because it constitutes a settlement of litigation. That position is obviously untenable. There is no authority or logic for the exclusion of "settlements" from assessments by "agreement" as an abstract matter. In this context, where the parties' agreement renders a state tax claim final, the tax is "assessed by agreement."

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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